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Supreme Court, U.S.
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In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPENDIX

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August 23, 2010

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United States District Court,
Southern District of Ohio, Eastern Division.
UNPUBLISHED

KEVIN H. McKENNA,

Plaintiff,

v.

NESTLE PURINA PETCARE CO.,

Defendant.

Case No. C2-05-976.

March 31, 2009.

OPINION AND ORDER

ALGENON L. MARBLEY, District Judge.
MARK ABEL. Magistrate Judge.

I. INTRODUCTION

This matter is before the Court on Defendant's and Plaintiff's Cross Motions for Summary Judgment. Plaintiff Kevin McKenna ("McKenna") sued Nestle Purina Petcare ("Nestle"), his former employer, asserting a claim for retaliatory termination and a claim for sexual harassment. Nestle also filed Motion to Strike exhibits attached to McKenna's Motion for Summary Judgment. For the reasons stated below, the Court **DENIES** Nestle's Motion to Strike, **GRANTS** Nestle's Motion for Summary Judgment, and **DENIES** McKenna's Motion for Summary Judgment.

II. BACKGROUND

A. Factual Background

McKenna worked for Nestle in Zanesville, Ohio as an Information Systems Technician from October 2001 until his termination on October 14,

2004. His job duties included overseeing Nestle's computer system, and assisting Nestle employees with their IT maintenance issues. All Nestle employees, including McKenna, were expected to be familiar with and abide by Nestle's Electronic Communications Policy ("ECP").

In early October 2002, McKenna began making verbal and email advances towards a female co-worker, Nancy Goss ("Goss"). Initially, these advances were rebuffed by Goss. Goss made it clear to McKenna that she was not interested in commencing a sexual relationship.[1] Undeterred by her refusal, McKenna continued to make advances towards Goss. Goss reported McKenna's behavior to her supervisor, Dante Benincasa. Ultimately, McKenna was written up for violating Nestle's sexual harassment policy.

In spite of these incidents, McKenna and Goss's working relationship evolved into a consensual, sexual relationship in October 2003, which lasted until July 2004. The relationship began with sexually explicit email exchanges and eventually led to sexual encounters between the two of them, both in and out of the workplace. Throughout their sexual relationship, Goss received sexually explicit emails from McKenna on a regular basis. Before the relationship with Goss, McKenna had been involved in a sexual relationship with another Nestle co-worker, Lisa Ellis ("Ellis"). During McKenna's relationship with Goss, he informed Goss of his previous relationship with Ellis, which led to Goss, Ellis, and McKenna participating in sexual trysts with each other.

The relationship between Goss and McKenna deteriorated, and in July 2004, Goss ended the

relationship due to McKenna's demonstrated interest in other employees at Nestle, particularly Ellis. One month after ending the relationship, Goss sent McKenna and Ellis an email requesting that they keep any sexual relationship between the two of them out of the office. Shortly thereafter, on August 31, 2004, McKenna met with his immediate supervisor, Carol Kagenski ("Kagenski"), and complained about Goss's changed, more hostile, demeanor towards him. McKenna verbally requested Kagenski not take any action based on his conversation with her, and again reiterated this request in writing on September 1. (*Letter to Nestle*, Sept. 1, 2004). After complaining about Goss's behavior, McKenna admits that Goss made no further threats, offensive remarks, or sexual advances towards him.

Goss, meanwhile, met with Kagenski and another Nestle supervisor, Mitzi Link ("Link"), at Link's condo to discuss the nature of her relationship with McKenna. She told both supervisors about what had happened between her and McKenna, and why the events would lead to her occasionally crying and making mistakes at work. Goss also provided Kagenski with emails between her and McKenna from their private email accounts, and told Kagenski that she believed McKenna was accessing her work computer. After meeting with Goss, and based on emails provided by Goss, Kagenski concluded that Goss and McKenna's situation was merely a common post-breakup dispute. Kagenski determined that the best course of action was to monitor both McKenna and Goss.

In September 2004, Goss sent a hostile and threatening letter to Ellis at her home expressing her

aversion towards Ellis and McKenna's relationship. Ellis informed Link of this incident, after which Link contacted Kagenski. On October 1, after Kagenski interviewed Ellis and Goss regarding the letter, Nestle suspended Goss, pending the outcome of an investigation into the letter. The investigation of the letter led Nestle's Information Security Department to review the Outlook folders of Goss, Ellis, and McKenna because all three individuals had been discussed in Goss's letter. In the course of investigating McKenna's Outlook folder, Nestle uncovered emails McKenna had sent containing pornographic pictures of a female friend and a male stripper in various sexual positions. The investigation also uncovered emails with sexually explicit language that had been sent during work hours to Goss, another woman named Tammy Sparks, and his wife. [2]

In October 2004, after the investigation was complete, Nestle terminated Goss for overtly threatening a co-worker (based on the contents of the letter sent by Goss to Ellis). Nestle also terminated McKenna for violating its ECP. Nestle suspended Ellis for three days and placed her on an Action Plan after it was discovered by Nestle that she spent an inordinate amount of time sending personal email messages during work hours, none of which were sexual in nature.

B. Procedural Background

McKenna filed a discrimination charge with the EEOC on April 4, 2005, which was dismissed based on the EEOC's finding that no probable cause existed to support that discrimination had occurred. McKenna filed a retaliatory termination and sexual

harassment claim against Nestle on October 25, 2005, approximately one year after he was terminated. McKenna alleges that Goss harassed him, that he complained of the harassment, and that he suffered retaliation for complaining of the harassment. In his Motion for Summary Judgment, filed January 26, 2009, McKenna also appears to assert a sex discrimination claim based on disparate treatment against. Nestle and McKenna now both move for summary judgment on all of McKenna's claims.

III. STANDARD OF REVIEW

Summary judgment is proper if "there is no genuine issue as to any material fact [such that] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). But "summary judgment will not lie if the...evidence is such that a reasonable party could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, the court must construe the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986.) The movant therefore has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F. 3d 1382, 1388-89 (6th Cir. 1993). But the non-moving party "may not rest upon its mere allegations." Fed. R. Civ. P. 56 (e); see *Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). The non-moving party must present "significant probative evidence" to show that there is more than "some

metaphysical doubt as to the material facts." Moore v. Philip Morris Co., 8 F.3d 335, 339-40 (6th Cir. 1993).

The standard of review for cross-motions of summary judgment does not differ from the standard applied when a motion is filed by only one party to the litigation. *Taft Broad. Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991). Furthermore,

> [t]he fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the court must evaluate each party's motion on its own merits....

Id. (citations omitted).

IV. LAW & ANALYSIS

A. Motion to Strike

Nestle moved to strike specific pages from the exhibits attached to McKenna's Response in Opposition to Defendant's Motion for Summary Judgment. The ground for Nestle's motion is that McKenna failed to authenticate any of the documents attached as exhibits to the Response in Opposition. Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings. *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999); see *Duncan v. Village of Middlefield*, No. 93-3818, 1994 WL 269578 (6th Cir. June 17, 1994) ("pro see plaintiffs are to be accorded a measure of leniency.") In addition "the formalities of the Federal Rules of Civil Procedure are to be applied less stringently

against pro se litigants than against lawyers." *Oasis Corp. v. Judd*, 132 F.Supp.2d 612, 616 (S.D. Ohio 2001), citing see *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Due to McKenna's pro se status, this Court finds his exhibits should not be stricken due to failure to authenticate. Nestle's Motion to Strike is thereby DENIED.

B. Retaliation

Title VII provides that:

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter [("the opposition clause"], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [("the participation clause")].

42 U.S.C. § 2000e-3(a). McKenna alleges that his termination by Nestle was in retaliation for complaining about Goss's sexual harassment.

McKenna must first establish a prima facie case of retaliation. See *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987). The burden then shifts to Nestle "to articulate some legitimate, nondiscriminatory reason" for its actions. See *Wrenn*, 808 F.2d 493 at 501. If Nestle carries this burden, McKenna must then prove by a preponderance of the evidence that the reason offered by Nestle was a pretext for discrimination. See *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "Disputation of the facts underlying [Nestle's] legitimate business

reason . . . is not sufficient to carry [McKenna's] burden"; rather, McKenna must present evidence to show that the reason given is an attempt to cover up the real discriminatory motive. See *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987).

1. Prima Facie Case of Retaliation

To establish a prima facie case of retaliation, McKenna must demonstrate by a preponderance of evidence the following four elements: (1) McKenna engaged in legally protected activity; (2) Nestle knew about McKenna's exercise of this right; (3) Nestle took an employment action adverse to McKenna; and (4) the protected activity and the adverse employment action are causally connected. See *Wrenn*, 808 F.2d 493 at 500; *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003).

For the first element, McKenna asserts that his complaint to Kagenski about Goss functions as a protected activity because it constitutes opposition under the meaning of the opposition clause. The Sixth Circuit has enumerated the types of activities that constitute opposition under Title VII:

> [C]omplaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer — e.g., former employers, union, and co-workers.

Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000). This Court finds that McKenna's act of complaining to Kagenski on August 31, 2004, prior

to Nestle's internal investigation, constitutes the kind of overt opposition that the Sixth Circuit has held is protected under Title VII. For the second element, it is obvious Nestle was aware of McKenna's complaint on August 31, 2004. For the third element, Nestle's termination of McKenna's employment constitutes adverse employment action.

The fourth element, that the protected activity and the adverse employment action are causally connected, however, has not been satisfied. "To establish a causal connection, a Defendant must proffer evidence sufficient to raise the inference that her protected activity was the likely reasons for the adverse action." *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir. 2007). McKenna asserts that the timing of his termination on October 14, 2004 was causally connected to his numerous complaints of sexual harassment. At his deposition he testified regarding the reason for the retaliation complaint:

> Q: I'm asking you for what evidence you have that Nestle retaliated against you for your complaint against Nancy Goss?
> A. That my employment was terminated probably within close to about 30 days, and I have no other evidence of anything unsatisfactory about my work performance prior to that.

(*McKenna Depo. Tr.* at p. 325). McKenna offers no evidence of retaliation other than temporal proximity. For Title VII retaliation claims "temporal proximity itself is insufficient to find a causal connection . . ." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 596 (6th Cir. 2007). This Court

finds, therefore, that McKenna has not established a causal connection existed between his complaint and his termination. Because McKenna fails to establish the fourth element, McKenna cannot make out a prima facie case of retaliation.

2. Legitimate Nondiscriminatory Reason

Assuming arguendo that McKenna had established a prima facie case of retaliation, the burden would shift to Nestle "to articulate some legitimate, nondiscriminatory reason" for its actions. See *Wrenn*, 808 F.2d 493 at 501. The Court finds that Nestle had a legitimate, nondiscriminatory reason for terminating McKenna—violation of its ECP. Nestle's ECP specifically states that prohibited computing activities include, but are not limited to: "Accessing, sending, forwarding, downloading, printing, or deliberate receipt of: pornographic, obscene, indecent or other sexually explicit materials." (Electronic Communications Policy at p. 4). Nestle's internal investigation of McKenna's computer activities uncovered that McKenna used his Nestle computer to send sexually explicit emails to Goss and several other persons, and stored sexually explicit pictures on his computer, which were subsequently sent to his wife from his Nestle email account.[3]

McKenna even admitted that he violated the ECP. McKenna stated, "...I KNOW that I have violated the Electronic Communications Policy, I'd never in my wildest dreams even think of challenging that fact, I don't feel as though I have ever tried to represent myself in any other way in regards to that." (*Email to Nestle, October 18, 2004*). Furthermore, McKenna was aware that the violation

of the ECP could potentially lead to his termination. He admitted, "...I very full and well know I was/am in violation of the company's Electronic Communications Policy...[and] am/was full aware of the potential consequences (including possible termination)." (*Id.*)

McKenna's only refutation to Nestle's legitimate, nondiscriminatory reason for terminating him is that the evidence against him is inadmissible and not authentic. McKenna insists that evidence of the sexually explicit documents contained within McKenna's Outlook account is inadmissible because it no longer exists. As part of Nestle's investigation of McKenna, Goss, and Ellis, the Information Security Department reviewed the email Outlook folders of all three employees, and uncovered the sexually explicit documents in McKenna's email account. McKenna claims that since Nestle "destroyed" his Outlook account upon his termination, the sexually explicit documents that the Information Security Department printed off are inadmissible against him as evidence that he violated the ECP.

Under the Federal Rules of Evidence, Rule 1004, the Admissibility of Other Evidence of Contents states:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

> (2) Original not obtainable. No original can be obtained by any available judicial process or procedure.

McKenna's Outlook account was destroyed, but there has been no allegation that this was done in bad faith. Furthermore, even though the account was destroyed, the original print outs of the emails are available. For these reasons, this Court finds McKenna's argument that the documents procured from his Outlook are inadmissible has no legal merit. Nestle has sufficiently established a legitimate, nondiscriminatory reason for terminating McKenna— violation of its ECP.

3. Pretext

Assuming arguendo that McKenna had established a prima facie case, because Nestle has established a legitimate, nondiscriminatory reason for terminating McKenna, the burden of production would once again shift back to McKenna to demonstrate, by a preponderance of the evidence, that this proffered reason is pretext for discrimination. See *Wrenn,* 808 F.2d 493 at 501. There are three ways to demonstrate pretext: (1) that the proffered reason has no basis in fact; (2) that the proffered reason did not actually motivate the termination; or (3) that the proffered reason was insufficient to motivate discharge. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

McKenna asserts that the proffered reason for his termination, violation of the ECP, has no basis in fact. There is no legitimate dispute that McKenna violated the ECP by, "Accessing, sending, forwarding, downloading, printing, or deliberate

receipt of: pornographic, obscene, indecent or other sexually explicit materials" on his work computer. (See Electronic Communications Policy at p. 4.) McKenna's assertion that words such as "cunt" may only be vulgar depending on the context with which they are used is plainly unmeritorious. (See McKenna Depo. Tr. at p. 114.) Although McKenna may not consider a word like "cunt" to be vulgar or profane, its common construction is a word that is vulgar and profane. Merriam-Webster defines the word as:

> 1) *usually obscene*: the female genital organs; also: sexual intercourse with a woman;
> 2) *usually disparaging and obscene*.

(*Merriam-Webster Online Dictionary*, 2009 (March 31, 2009), *available at* http://www.merriam-webster.com/dictionary/cunt). Encarta defines the word as:

> 1) a highly offensive term for a woman's genitals (*taboo*);
> 2) a highly offensive term for a woman (*taboo*)
> 3) a highly offensive term for somebody who is viewed with great dislike or contempt, especially a man (*taboo insult*)
> 4) a highly offensive term for sexual intercourse with a woman (*taboo*).

(*Encarta World English Dictionary*, 2009 (March 31, 2009), *available at* http://encarta.msn.com/ dictionary _1861601919/definition/html). McKenna also contends that he does not see sex as a taboo topic to be discussed over work emails. (*Id.* at p. 31.)[4] Although McKenna may personally feel he is free to discuss whatever he wants at work, any reasonable

person would recognize that sex is a taboo topic that should not be discussed over work emails. The Court finds that Nestle clearly has a basis in fact for determining that McKenna's emails were obscene and sexually explicit in nature, and thereby violated the ECP.

McKenna also asserts that the proffered reason for terminating him did not actually motivate the discharge; rather, he asserts he was terminated for complaining about sexual harassment. There is no evidence, other than temporal proximity, to suggest that the reason McKenna was fired was due to his complaint to Kagenski about Goss. As already stated, "temporal proximity itself is insufficient to find a causal connection . . ." *Michael*, 496 F.3d at 596. Furthermore, the Court finds that the evidence supports that the motivation for McKenna's discharge was his violation of the ECP.

McKenna finally asserts that Nestle's proffered reason for terminating him was insufficient to motivate his discharge. McKenna asserts that Nestle has never discharged another employee for violating the ECP, and that the majority of employees also violate the ECP. He also asserts that Ellis also violated the ECP, but she was not terminated. He contends these two facts establish that violation of the ECP is an insufficient reason for discharging an employee. Both of McKenna's assertions fail to establish that violation of the ECP was insufficient to motivate discharge.

First, McKenna does not assert that any other employee has ever violated the ECP by sending sexually explicit emails, or that any other employee was not terminated for sending sexually explicit emails. Many employees presumably violate the ECP

in some way (i.e., spending too much time at work sending personal emails); but this type of ECP violation differs from a violation in which someone is sending sexually explicit emails from his work computer laced with obscene language and pornographic pictures. McKenna has not shown that Nestle has not or would not terminate another employee for a violation of the ECP in the way he has violated the ECP. The fact that Nestle has never discharged another employee for violating the ECP does not establish that McKenna's violation of the ECP is an insufficient reason to motivate discharge.

Second, McKenna cannot establish pretext by asserting that he was treated less favorably than Ellis, because she was not a similarly situated employee. To be "similarly situated" the individual with whom the plaintiff seeks to compare his treatment

> must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Jackson v. FedEx Corp. Servs., Inc., 518 F.3d 388, 393 (6th Cir. 2008) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 383 (6th Cir. 1992)). Although Ellis was subject to the same ECP as McKenna (as were all Nestle employees), Ellis did not deal with the same supervisor as McKenna, nor did they share the same position or job duties (she was an accounting clerk, and McKenna was an Information Systems Technician in charge of Nestle's computer system

and internet). More significantly, Ellis did not engage in the same conduct as McKenna. Ellis received a Final Written Warning for violating Nestle's ECP, but Ellis' violations were for excessive use of emails, not for sending and receiving sexually explicit emails. (*Kagenski Affidavit* at pp. 5-6.) Therefore, the fact that Ellis violated the ECP, but was not terminated, does not demonstrate that a similarly situated, non-protected employee was treated more favorably.

Because McKenna has failed to show a causal connection, which is required to establish a prima facie case, and because McKenna further has failed to establish Nestle's legitimate nondiscriminatory reason was pretextual, this Court hereby **GRANTS** Nestle's Motion for Summary Judgment on the retaliatory termination claim, and **DENIES** McKenna's Motion for Summary Judgment on that claim.

C. Sexual Harrassment

McKenna also asserts a sexual harassment claim against Nestle. To establish a prima facie case for sexual harassment, McKenna must demonstrate: (1) he was a member of a protected class; (2) he was the subject of unwelcome harassment; (3) the harassment was based on sex; (4) the harassment unreasonably interfered with McKenna's work performance or created a hostile or offensive work environment that was severe and pervasive; and (5) the employer knew, or should have known, of the harassment and failed unreasonably to take prompt and appropriate corrective action. *Williams v. General Motors Corp.*, 197 F.3d 553, 560-61 (6th Cir. 1999).

McKenna contends that actions taken by Goss and Ellis constituted sexual harassment. McKenna fails to show, however, that any actions taken by Goss which McKenna asserts were harassing were "based on sex." McKenna furthermore fails to show that any actions taken by Goss or Ellis created a hostile or offensive work environment. Finally, McKenna fails to show that Nestle knew or should have known of the harassment and failed to take appropriate action.

For the third prong, McKenna has not shown that any actions taken by Goss were "based on sex." "Harassment" in the sexual harassment context is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Greenwood v. Delphi Auto. Sys., Inc.*, 257 F. Supp. 2d 1047, 1059 (S.D. Ohio 2003). "To be of a sexual nature, verbal conduct must be gender related." *Id.* If the conduct is "simply abusive, with no sexual element," that is not harassment because of the plaintiff's sex. *Id.* As the Sixth Circuit noted in *Rothenbusch v. Ford Motor Comp.*, No. 93-3945, 1995 WL 431012 (6th Cir. July 20, 1995),

> To show that the alleged harassment was based on sex, Plaintiff must prove by a preponderance of the legal evidence that but for the fact of her sex, she would not have been the object of unlawful harassment. Harassment is prohibited by ***Ohio law*** only if it is based on being male or female. ***Personal animosity is not the equivalent of sexual harassment and is not proscribed by law.*** *Id.* at *3 (emphasis added).

McKenna and Goss maintained a consensual, sexual relationship for approximately eleven months. Goss ended her relationship with McKenna on July 28, 2004. McKenna testified that Goss made no advances or sexual remarks to him between July 28, 2004 and October 1, 2004, the date of Goss's suspension. (*McKenna Depo Tr.* at p. 258-59.) McKenna could only make the vague comment that she made his life "hell." (*Id.* at p. 239.) McKenna has produced no evidence that any alleged harassment from Goss was based on sex. Instead, the evidence establishes that Goss's cantankerous behavior towards McKenna was not based on his status as a male, but based on his status as someone with whom she was ro[redacted]tically involved. Goss treated Ellis, a female, as adversely as McKenna, because Goss believed McKenna and Ellis were ro[redacted]tically involved. (*McKenna Depo. Tr.* at p. 343; *Goss Depo Tr.* at p. 36.) Thus, Goss's behavior can be described merely as "personal animosity," which is not the equivalent of sexual harassment.

For the fourth prong, McKenna has not shown that he was subjected to a hostile or offensive work environment that was severe and pervasive. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive `to alter the condition of [the victim's] employment and create an abusive working environment.'" *Id.* at 67; see *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986). In determining whether a plaintiff has met this burden, this Court must consider a reasonable person's reaction to a similar environment under like circumstances. *Rabidue*, 805 F.2d at 620.

Taking all of McKenna's allegations as true, Goss's conduct simply does not rise to the level required to be actionable under Title VII. McKenna testified that there was no one specific act to describe Goss's actions as hostile or abusive, and that it was just her demeanor post-breakup. (See *McKenna Depo. Tr.* at p. 153) ("[t]here is no one specific act. It was just her demeanor in every way, shape and form"). He also admitted that Goss did not make any threats or demands, lewd or offensive remarks, sexual advances, or threatening phone calls. (*Id.* at p. 263.)

Taking all of McKenna's allegations as true, McKenna also has not established that the "Rope Joke" email made by Ellis, which he contends was "male bashing" rises to the level to be actionable under Title VII. Ellis's "Rope Joke" email can be characterized as more akin to "simple teasing, offhand comments, and isolated incidents," rather than "discriminatory intimidation, ridicule, and insult" sufficiently serious to have altered the conditions of McKenna's employment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). No reasonable person would view the actions of Goss or Ellis as subjecting him to a hostile or offensive work environment that was severe and pervasive.[5]

Finally, for the fifth prong, McKenna has not established that Nestle knew, or should have known, of any harassment and failed unreasonably to take prompt and appropriate corrective action. This Court finds that Kagenski did not unreasonably fail to take appropriate corrective action with respect to McKenna's complaint about Goss's behavior. Indeed, once McKenna voiced concerns to Kagenski about Goss's behavior, she determined the best course of

action was to monitor the situation. (*Kagenski Affidavit* at 13.) Further, McKenna acknowledges he requested no action be taken by Kagenski and followed up this verbal request with a written request that no action be taken as a result of McKenna's conversation with Kagenski. (*McKenna Depo. Tr.* at pp. 158, 160, and Kagenski Affidvit at 12.) The written request stated, in relevant part:

> Carol I had come to you on Tuesday, August 31st 2004 strictly, explicitly and only to have casual, "off the record" type of conversation, so that an impartial person be aware of something that could potentially become an issue. It is not, and was not my intent to file a complaint or take any sort of "Action" in regards to the matter. . . . [I am] thereby formally documenting [my] wish that NO ACTION be taken at this time, and thereby formally documenting why the company did not take action in the matter when they were made aware that the situation existed. . . . It is with this document, that I am making it formally known that it is my (emphatic) wish that there be absolutely NO ACTION taken by the company in any way shape or form regarding this matter at this time.

(*Letter from McKenna to Link, Sept. 1, 2004.*) McKenna cannot now assert that Kagenski failed to take appropriate action when McKenna specifically requested she not take any action.

This Court also finds that Link did not unreasonably fail to take appropriate corrective action with respect to McKenna's complaint about Ellis's "Rope Email." McKenna asserts that when he

went to complain to Link, she stated, "Ya well, when you get burned a few times like we have, you get a bad attitude" and did not discipline Ellis (Plaintiff's Motion at pp. 13-14.) The evidence establishes, however, that McKenna requested that no action be taken by Link for the email sent by Ellis. McKenna sent an email to Link stating, "I debated over an entire weekend on how best to handle the [email sent by Ellis] and decided for harmony's sake it was a better choice to let it blow over peacefully." (Email to Link at p. 44.) McKenna cannot now assert that Link's failure to discipline Ellis for the email, for which McKenna specifically requested she not discipline Ellis, was a failure of Nestle to take appropriate action.

Because McKenna has failed to establish several of the prongs for a prima facie case for sexual harassment, Nestle's Motion for Summary Judgment on the claim for sexual harassment is **GRANTED**, and McKenna's Motion for Summary Judgment on that claim is **DENIED**.

D. Sex Discrimination

Although never addressed in his Complaint, or in his multiple opportunities to amend his Complaint, McKenna, for the first time, appears to assert a claim of sex discrimination based on disparate treatment in his Motion for Summary Judgment. Even if this Court entertains McKenna's allegation of sex discrimination, he fails to demonstrate a prima facie case.

A plaintiff in a Title VII disparate treatment case may prove discriminatory intent in one of two ways. First, a plaintiff may present "credible, direct evidence of discriminatory animus." *Terbovitz v.*

Fiscal Court, 825 F.2d 111, 115 (6th Cir. 1987). Direct evidence is that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Johnson v. The Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003) (citations omitted). Moreover, direct evidence requires that the fact finder cannot "draw any inferences in order to conclude the challenged employment action was motivated at least in part by prejudice .. . " *Id.* Because of this, it is the "rare situation when direct evidence is readily available." *Kline v. TVA*, 128 F.3d 337, 348 (6th Cir. 1997).

A plaintiff may also establish discriminatory intent without direct evidence under the three-part framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248 (1981). If the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the decision. *Burdine*, 450 U.S. at 253-54. If the employer meets its burden of production, the plaintiff can still prevail by showing that the proffered reason is a pretext for discrimination. *Id.* at 256.

McKenna contends that he has evidence that constitutes direct evidence of discriminatory intent. This Court finds that the record is devoid of evidence that requires the conclusion that unlawful discrimination was at least a motivating factor in his termination. Since McKenna failed to present direct evidence of discriminatory intent, his claim is analyzed under the test outlined in *McDonnell Douglas* and *Burdine*.

To establish a prima facie case of gender discrimination under Title VII, McKenna must demonstrate that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) he was qualified for the position; (4) he was replaced by a person outside the protected class, or treated differently than similarly situated non-protected employees. *McDonnell Douglas*, 411 U.S. 792 at 802; *Burdine*, 450 U.S. 248 at 248; *Vincent v. Brewer Co.*, 514 F.3d 489, 494 (6th Cir. 2007).

As to the second prong, there are two different actions that McKenna asserts constitute an adverse employment action. The first action is that Goss was granted an off-site meeting by Link, but that McKenna was not granted the same off-site meeting. The second action is McKenna's termination.

McKenna argues that when Link held an off-site meeting at her condo with Goss, and Kagenski, but refused to hold such an off-site meeting with McKenna, that amounted to an adverse employment action. McKenna asserts that the "clandestine" meeting which occurred between Link, Goss, and Kagenski, but not with McKenna, is evidence demonstrating Link's predisposition to discriminate against McKenna. McKenna's assertion that there was discrimination because Link met with Goss, a female, but not with McKenna, a male, is without legal basis. An adverse employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008) (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1999)). An off-site meeting

between three female co-workers clearly does not constitute an adverse employment action.[6]

McKenna's termination constitutes an adverse employment action. McKenna, nevertheless, cannot establish the fourth prong of the prima facie case because he cannot demonstrate that he was treated differently than a similarly situated employee with respect to the termination action. McKenna complains that Ellis was not terminated for her violation of the ECP, but he was terminated, so he was treated differently. As already analyzed by this Court, Ellis was not "similarly situated" to McKenna because she did not deal with the same supervisor as McKenna, nor did they share the same position or job duties (she was an accounting clerk, and McKenna was an Information Systems Technician). More significantly, Ellis did not engage in the same conduct as McKenna. Ellis received a Final Written Warning for violating Nestle's ECP, but Ellis' violations were for excessive use of emails, not for sending and receiving sexually explicit emails. (*Kagenski Affidavit* at pp. 5-6.) "[I]t is the discrimination plaintiff's burden to establish that the other employee's acts were of `comparable seriousness' to his or her own infraction." *Summerville v. Ross/Abbot Labs*, No. 98-3517, 1999 WL 623786, at *19 (6th Cir. Aug. 10, 1999) (quoting *Mitchell*, 964 F.2d 577 at 583). Thus, McKenna cannot demonstrate a similarly situated, non-protected employee was treated differently than McKenna.

Because McKenna cannot establish the fourth prong of the prima facie case for sex discrimination based on disparate treatment, Nestle's Motion for Summary Judgment on the claim for sex

discrimination is **GRANTED**, and McKenna's Motion for Summary Judgment on that claim is **DENIED**.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Nestle's Motion to Strike, **GRANTS** Nestle's Motion for Summary Judgment with respect to all of McKenna's claims, and **DENIES** McKenna's Motion for Summary Judgment with respect to all of McKenna's claims. This case is **DISMISSED**. All remaining pending motions are **MOOTED**.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALEGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: March 31, 2009

[1] McKenna asserts that Goss was attracted to McKenna even before McKenna had even accepted employment with Nestle. Despite any initial attraction to McKenna, this Court finds McKenna's assertion to be immaterial to the events that later ensued. Sexual harassment can occur regardless of an initial attraction between the two parties prior to the commencement of the harassment.

[2] McKenna asserts that the emails he wrote did not contain sexual innuendo, and that Goss's interpretation is "delusional." This is not true. The emails that McKenna sent to Goss were clearly indecent and contained sexually explicit content. For instance, one of these emails included a description

of McKenna masturbating at work and ejaculating onto brownies. McKenna's assertion is unfounded.

[3] The following are some of the emails sent by McKenna from his work computer:

(1) "You'll be able to feel yourself contracting all over your hand, how wet, excited you are/get, how your cunt gushes from being HF'd . . . Mmm . . ." (Email to Tammy Sparks, Aug. 1, 2003)

(2) "Hmmmmm/Mmmmmm . . . found out something interesting . . . was sitting here a bit ago . . . *HAPPENED* to have my hand across my lap . . . started tapping my fingers . . . jeans were tight enough I could FEEL the tapping across my c#ck . . . felt GOOD, I could feel myself LIKING IT, Getting h#rd . . . I let my fingers get closer so I could feel the sensation better . . . MMMMM . . . MORE was better . . so I started PATTING it, ALMOST smacking it . . . LOVED IT!!!!!!!! WHEW!" (Email to Goss, June. 16, 2004)

(3) "I HAVE TO SAY ...when I'm "in the mood" ... Mitzi looks pretty damned good ... if she TRIED, she could be a real hottie..." (Email to Goss, July 8, 2004)

[4] McKenna admitted in his affidavit, attached to McKenna's Motion, in regards to his relationship and email communications with Goss,

[v]irtually all of the `candid adult/sexual' aspect of the relationship was by means of `erotic' or `fantasy' natured conversations through private email accounts. There were some (approximately a

`handful') sexually natured `events' between Goss and I, inspired by these erotic or fantasy natured email conversations which occurred over the duration of that relationship. (McKenna's Affidavit at p. 2, emphasis added).

[5] McKenna's Motion for Summary Judgment and Reply are not well organized, and it is often difficult for the Court to determine what actions he is complaining about for what claims. To the extent he complains about any actions of Link, this Court finds that no actions or statements of Link constitute sexual harassment. This is mainly because nothing she said or did could be considered severe or pervasive so as to create a hostile work environment.

[6] In addition, the record shows that McKenna's email to Link requesting an off-site meeting indicated that a conversation was not urgent (using words to describe the desired time of the meeting as "whenever, today, tomorrow, next week . . .") and even after Link's response to McKenna inviting him to meet the following week, McKenna's response continued to impress that meeting with Link was not critical ("it's 100% up to you . . . it's nothing URGENT"). (Email to Kagenski, Sept. 15, 2004.) McKenna gave no indication that his conversation was a pressing matter, yet faults Link for sex discrimination by not granting him an off-site meeting.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN H. MCKENNA,
Plaintiff-Appellant,

v.

NESTLE PURINA PETCARE COMPANY,
Defendant-Appellee.

On Appeal From The United States District Court
for the Southern District of Ohio

ORDER

Before: BOGGS, MOORE, and COOK,
Circuit Judges.

Kevin H. McKenna, an Ohio resident proceeding *pro se*, appeals a district court's judgment granting the defendant's motion for summary judgment, denying McKenna's motion for partial summary judgment, and dismissing McKenna's amended complaint. McKenna has also filed a motion to seal the defendant's appellate brief. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2005, McKenna filed a complaint against Nestle Purina PetCare Company ("Nestle") alleging

sexual harassment, gender discrimination, and retaliatory termination. McKenna sought compensatory and punitive damages. He later filed an amended complaint making the same allegations. Nestle filed a motion for summary judgment. McKenna filed a motion for partial summary judgment. The district court granted Nestle's motion, denied McKenna's motion, and entered a judgment dismissing McKenna's amended complaint.

On appeal, McKenna argues that the district court relied on erroneous facts and misapplied the standard applicable to summary judgment motions. We review the grant or denial of summary judgment de novo. *Yeschick v. Mineta*, 521 F.3d 498, 502 (6th Cir. 2008). Summary judgment is appropriate when the evidence presented shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). The moving party bears the burden of showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks and citation omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

McKenna first argues that Nestle knew that he was being sexually harassed and that it failed to

take appropriate corrective action. To prevail on a claim of co-worker sexual harassment, a plaintiff must prove that (1) he was subject to unwelcome sexual harassment; (2) the harassment was based on his gender; (3) the harassment created a hostile work environment; and (4) the defendant knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir 2008); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999). To establish a hostile work environment, "the plaintiff must show that the conduct in question was severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and that the victim subjectively regarded it as abusive." *Smith v. Leggett Wire Co.*, 220 F.3d 752, 760 (6th Cir. 2000).

McKenna fails to establish a prima facie case of sexual harassment. McKenna has not submitted any evidence showing that any action on the part of the alleged harassers was based on his gender. Instead, the evidence shows that the alleged harassers' actions toward McKenna were based on personal conflict resulting from the fact that McKenna had engaged in ro[redacted]tic relationships with them. McKenna has also not demonstrated that the actions of the alleged harassers were sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Thus, McKenna has not demonstrated that he was subjected to actionable sexual harassment.

McKenna also argues that Nestle terminated his employment because of his gender and in retaliation for his complaints of sexual harassment. To establish a prima facie case of retaliation, a plaintiff must establish that (1) he engaged in protected activity; (2) the employer knew of the exercise of the protected right; (3) the employer subsequently took an adverse employment action against the employee; and (4) a causal connection existed between the protected activity and the adverse employment action. *Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 639 (6th Cir. 2009); *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987). To establish a prima facie case of gender discrimination, a plaintiff must show that (1) he is a member of a protected group; (2) he was subjected to an adverse employment decision; (3) he was qualified for the position; and (4) similarly situated, non-protected employees were treated more favorably. *Vincent v. Brewer Co.*, 514 F.3d 489, 494 (6th Cir. 2007). If the plaintiff establishes a prima facie case of either retaliation or discrimination, the defendant then has the burden of articulating a legitimate, non-discriminatory reason for its actions. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Wrenn*, 808 F.2d at 501. Once the defendant has set forth the non-discriminatory reasons, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the defendant's reasons were pretextual. *Burdine,* 450 U.S. at 253; *Wrenn,* 808 F.2d at 501.

McKenna has established that he engaged in a protected activity when he complained to his supervisor Carol Kagenski, concerning a co-worker's actions. *See Johnson v. Univ. of Cincinnati*, 215 F.3d

561, 579-80 (6th Cir. 2000). He has also shown that Nestle was aware of his complaints and that he suffered an adverse employment action when his employment was terminated. However, even assuming that McKenna has satisfied the final element of the prima facie case for retaliation and made a prima facie showing of gender discrimination, he has not met his burden of showing that Nestle's reason for terminating his employment was pretextual.

Nestle asserts that it terminated McKenna's employment because he violated the terms of its Electronic Communications Policy ("ECP") by sending and receiving sexually explicit emails and photos using his work computer. The ECP prohibits certain computing activities including accessing, sending, forwarding, and downloading pornographic, obscene, indecent, or other sexually explicit materials. The ECP provides that any employee who violates the policy is subject to disciplinary action up to and including termination. The evidence shows that McKenna violated the ECP by accessing and sending obscene, indecent, and other sexually explicit materials. In fact, McKenna admitted that he violated the ECP. Because Nestle has set forth a legitimate, non- discriminatory reason for terminating McKenna's employment, McKenna must show that the reason was pretextual by producing evidence sufficient for a reasonable finder of fact to reject Nestle's proffered reason. He can do so by showing that Nestle's proffered reason (1) has no basis in fact; (2) did not actually motivate its conduct; or (3) was insufficient to warrant the termination of his employment. *See Michael v.*

Caterpillar Fin. Servs. Corp., 496 F.3d 584, 597 (6th Cir. 2007).

McKenna argues that Nestle's proffered reason for terminating his employment had no basis in fact; that the evidence in support of its reason is inadmissible; and that his violation of the ECP did not motivate his discharge as shown by the temporal proximity between his complaints and his discharge, the gender bias of the supervisors who made the termination decision, and the fact that other employees, including his alleged harassers, were not discharged despite the fact that they also violated the ECP. McKenna's arguments are unavailing. First, as noted above, McKenna's own admission and the evidence of the explicit emails constitutes a factual basis supporting Nestle's proffered reason for terminating McKenna's employment. The fact that Nestle eventually deleted McKenna's email account does not make the email evidence inadmissible because McKenna has not shown that Nestle deleted the account in bad faith and copies of the emails were available. *See* Fed. R. Evid. 1004. McKenna has also not submitted evidence showing that Nestle treated him differently than other similarly situated employees when it discharged him for violating the ECP. While one of his alleged harassers was only suspended for violating the ECP, the evidence does not show that she engaged in comparable violations of the policy as she was reprimanded for using her work email for personal uses. Further, McKenna has not specifically identified any other Nestle employee who violated the ECP in a comparable manner yet avoided discharge. Finally, McKenna's evidence does not demonstrate that gender bias was a factor in his discharge.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit. We deny McKenna's motion to seal Nestle's appellate brief. Because the quotations from McKenna's deposition transcript which was sealed by the district court are neither crucial nor damaging, and in light of the fact that the district court itself quoted extensively in its public opinion from the sealed deposition, we hold that sealing of an appellate brief is not appropriate in this instance. Any concern for citation or quotation of a document sealed by the district court can be addressed by that court.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

No. 09-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN H. MCKENNA,
Plaintiff-Appellant,

v.

NESTLE PURINA PETCARE COMPANY,
Defendant-Appellee.

Mar 30, 2010

ORDER

Before: BOGGS, MOORE, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

STANDING ORDER GOVERNING CIVIL MOTIONS FOR SUMMARY JUDGMENT

SUSAN J. DLOTT
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

A. Motions for Summary Judgment

1. Movant's Statement of Proposed Undisputed Facts

There shall be attached to every opening brief in support of a motion for summary judgment a document entitled "Proposed Undisputed Facts", which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in this statement will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with (A)(2) of this Standing Order.

2. Opponent's Response to Proposed Undisputed Facts and Statement of Disputed Issue of Material Fact

There shall be attached to every brief in opposition to a motion for summary judgment a document entitled "Response to Proposed Undisputed Facts" which states, in separately numbered paragraphs corresponding to the paragraphs contained in the moving party's statement of Proposed Undisputed Facts, whether

each of the facts asserted by the moving party is admitted or denied. The Response to Proposed Undisputed Facts must also include, in a separate section entitled " Disputed Issues of Material Fact," a list of each issue of material fact as to which the opponent contends there is a genuine issue to be tried.

3. Citations

Each statement of material fact in a statement of Proposed Undisputed Facts or Response to Proposed Undisputed Facts, and each denial in a statement of Disputed Issues of Material Fact, must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial, (2) a sworn deposition, and/or (3) other evidence, including documentary evidence, that would be admissible at trial. The affidavits, deposition testimony responses to discovery requests, or other documents containing such evidence, unless already lodged with the Court, shall be filed and served with the statement of Proposed Undisputed Facts or Response in accordance with Federal Rule of Civil Procedure 56(e).

4. Form of Service

The statements referred to above shall be filed and served along with the motion, brief and certificate of service required by this Court's rules and Federal Rule of Civil Procedure 56.

5. Special Notice from Moving Parties to Pro Se Litigants

Any represented party moving for summary judgment against a party proceeding pro se shall file and serve, as a separate document, the form attached as Exhibit A to this Order. If the pro se party is not a plaintiff, or the case is to be tried to the Court rather than a jury, the movant may modify the notice as appropriate. The movant shall attach to the notice copies of this Standing Order and Federal Rule of Civil Procedure 56.

6. Striking and refilling of Briefs

The Court may, at its discretion, strike briefs that do not conform to the requirements above. Once a brief is stricken, a party must re-file a conforming brief within 30 days in order to preserve the motion.

B. Effective Date

This Order applies to all summary judgment motions filed on or after March 1, 2006.

IT IS SO ORDERED.

Susan J. Dlott
United States District Judge

EXHIBIT A

Notice to Pro Se Litigant Opposing Motion for Summary Judgment as Required by Standing Order Governing Motions for Summary Judgment

The purpose of this notice, which is required by the Court, is to notify you that the defendant has filed a motion for summary judgment asking the Court to dismiss all or some of your claims without a trail. The defendant argues that there is no need for a trial with regard to these claims because no reasonable jury could return a verdict in your favor.

THE DEFENDANT'S MOTION MAY BE GRANTED AND YOUR CLAIMS MAY BE DISMISSED WITHOUT FURTHER NOTICE IF YOU DO NOT FILE PAPERS AS REQUIRED BY RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S STANDING ORDER GOVERNING MOTIONS FOR SUMMARY JUDGMENT. COPIES OF RULE 56 AND THE COURT'S STANDING ORDER ARE ATTACHED TO THIS NOTICE, AND YOU SHOULD REVIEW THEM VERY CAREFULLY.

The papers you file must show one or both of the following:

(A) That you disagree with the defendant's view of the law governing your case; AND/OR

(B) That

(1) You disagree with the defendant's version of the facts;

(2) You have evidence contradicting the defendant's version; AND

(3) The evidence you rely on, if believed by a jury, would be sufficient to support a verdict in your favor. To make this showing, you must file one or more affidavits disputing the defendant's version of the facts. An affidavit is a sworn statement by a witness that the facts contained in the affidavit are true to the best of the witness's knowledge and belief. To be considered by the Court, an affidavit must be signed and sworn to in the presence of a notary public or other person authorized to administer oaths. In addition to affidavits, you may also file deposition transcripts, responses to discovery requests, and other evidence that supports your claims.

If you fail to submit evidence contradiction the defendant's version of the facts, your claims may be dismissed without further notice. It is therefore very important that you read the defendant's motion, memorandum of law, affidavits, and other evidentiary materials to see if you agree or disagree with the defendant's version of the relevant facts. It is also very important that you review the enclosed copy of Standing Order Governing Motions for Summary Judgment carefully. This Order provides detailed instructions concerning the papers you must file in opposition to the defendant's motion, including how you must respond to specific facts the defendant claims are undisputed, see (A)(2), and how you must support your claims with specific references to evidence, see (A)(3).

YOU MUST FILE YOUR RESPONSE PAPERS with the Clerk of the Court and serve a copy to defendant's counsel WITHIN 21 DAYS OF THE FILING OF DEFENDANT'S MOTION WITH THE CLERK OF COURT.

If you fail to follow these instructions, the defendant's motion may be granted.

Nestle Purina PetCare

North America

22 SOUTH FIRST STREET
P.O. BOX 38
ZANESVILLE, OH 43702-0038 USA
TEL 740 454 [illegible]
FAX 740 455 0781

October 19, 2004

Kevin McKenna
4885 Adamsville Road
Zanesville, OH 43701

Kevin:

This correspondence is provided to you in response to your e-mail dated October 18, 2004.

The decision, which led to your termination of employment, was based on your violation of the Information Security Policy as it relates to electronic communications. Additionally, you admitted to this violation. Furthermore, your termination has no relationship to any previous conversations you may have had with our local HR Manager.

At this time, we do not see need for continued discussion regarding this matter.

Regretfully,

Mitzi Link
Controller

cc: Dante Benincasa
Carol Kagenski

Nestlé

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Kevin H. McKenna, :
Plaintiff, :
v. : Case 2:05-cv-0976
Nestle Purina PetCare Company: Judge MARBLEY
Defendant. :

OPINION AND ORDER

Plaintiff, Kevin H. McKenna, filed this action against Nestle Purina PetCare Company, his former employer. He asserts that he was discharged after complaining of sexual harassment by a co-worker. The case is currently before the Court to consider a number of motions which the parties have filed and which relate to procedural matters including the pleadings and the conduct of discovery. The Court will describe each motion below as well as the disposition to be made of that motion. A separate order will issue addressing Mr. McKenna's motion to stay this litigation.

I.

A brief factual background is helpful to put each of the pending motions into context. According to Mr. McKenna's complaint, he advised the human resources manager at his workplace, Carol Kagenski, on August 31, 2004 that he was being sexually harassed by a co-worker named Nancy Goss. He alleges that he informed his immediate supervisor, Mitzi Link, of the same information on September 17, 2004, and that he advised both Ms. Kagenski and Ms. Link that he feared for his safety and the safety of his co-workers based upon Ms. Goss's conduct.

Ms. Goss's employment was terminated shortly thereafter. Apparently as a result of investigating Ms. Goss's conduct, Nestle began an investigation of the conduct of two other employees, Mr. McKenna and Lisa Ellis. On October 14, 2004, Mr. McKenna's employment was terminated because, according to Nestle, he violated its electronic communications policy based upon the content of certain e-mails which he had sent. Ms. Ellis was also disciplined, but she was suspended rather than discharged. Mr. McKenna claims in his complaint that the reasons given for his discharge were pretextual and that the real reason Nestle discharged him was in retaliation for his having complained about sexual harassment in the workplace. He seeks relief in this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-5 et seq.

II.

Before turning to a discussion of each of the pending motions, the Court notes that the undersigned Magistrate Judge has held numerous conferences with Mr. McKenna and counsel for Nestle. The Court had concluded, as a result of those conferences, that many of the issues raised by the discovery- related motions had been satisfactorily resolved and that the parties were in a position to complete discovery without the need for further guidance from the Court. However, the parties recently advised the Court that rulings are necessary before discovery can be completed. Additionally, all pending discovery has been postponed while the Court considers the merits of the motion to stay. The following rulings will, hopefully, provide the parties with additional and necessary guidance when discovery resumes.

III.

The Court turns first to document #19, which is a motion filed by Mr. McKenna to strike document #18. Document #18 was a memorandum filed by Nestle in response to one of Mr. McKenna's previous motions. According to Mr. McKenna, #18 was filed after the Court-established deadline for filing the document (albeit only one day after) and contains a number of false statements concerning the facts surrounding Ms. Goss's suspension and termination as well as other facts relating to the background of this case. In response, Nestle asserts that the one-day delay in filing the document was due to a clerical error and notes that it was served on Mr. McKenna by the due date. In response, Mr. McKenna continues to argue vehemently that the factual portion of the memorandum contains many misstatements and should be stricken for that reason.

The Court accepts Nestle's explanation that the document was filed a day late due to a clerical error. Further, the Court has already ruled on the merits of the motion to which #18 was a response. That ruling did not require the Court to credit those factual statements set forth in #18. The Court notes that the facts of this case will ultimately be determined through either a summary judgment process or through trial, and neither of those processes will be affected by the statements set forth in #18. To the extent that Mr. McKenna asserts that Nestle's attorneys made factual statements in #18 which were unsupported by any evidence, the Court has had the occasion to review other filings in this case and notes that most of the statements set forth in #18 appear to be the version of the events set forth

by Nancy Goss. The Court understands that there may ultimately be a substantial controversy over whether Ms. Goss's recitation of these events is true. Nonetheless, it does not appear that Nestle or its counsel acted in bad faith in providing this statement of facts to the Court. For all of those reasons, the Court concludes that the motion to strike is not well-taken and it will be denied.

IV.

The next motion pending is document #23, a motion for protective order filed by Nestle on April 5, 2006. The Court concludes that this motion was resolved as a result of discussions held at a discovery conference and it will be denied as moot.

V.

The Court turns next to two related motions. On April 14, 2006, Mr. McKenna filed a motion (#25) asking the Court to deem his requests for admissions which were served on March 6, 2006 to be deemed admitted because Nestle had not responded to them. On May 4, 2006, Nestle filed a motion (#28) asking the Court to strike Mr. McKenna's motion. The primary issued raised by these two motions is whether the Court directed Nestle to respond to the requests for admissions within one week of the April 6, 2006 discovery conference. Apparently, Nestle responded to the requests on April 28, 2006.

The Court has reviewed its notes of the April 6, 2006 discovery conference and advises the parties of the following. Nestle was directed to provide Mr. McKenna with information within a week of that conference on two issues. The first was whether it had located any additional documents relating to the prior discipline of Mr. McKenna for alleged sexual harassment. The second was whether Nestle had

located additional documents about its human resources process reflecting how Nestle processed Mr. McKenna's sexual harassment charge concerning Ms. Goss. Other matters discussed at the conference, including the question of whether Nestle would be required to respond to all of Mr. McKenna's interrogatories and requests for admissions, were tabled for further discussion between the parties. Thus, until such time as the Court actually entered an order directing Nestle to respond to the requests, or the parties reached an agreement concerning such a response, Nestle's responses were not overdue. Given the fact that Nestle has represented that it responded on April 28, 2006, and the fact that that date appears consistent with the discussions had at the April 6, 2006 discovery conference, there is no merit to Mr. McKenna's motion. At the same time, however, there is no reason to strike it from the record. Both motions will therefore be denied.

VI.

On June 12, 2006, Mr. McKenna filed a motion (#41) asking for sanctions against Nestle for failure to comply with a Court order and for failure to cooperate in discovery. This motion relates to Nestle's effort to retrieve the contents of Mr. McKenna's e-mail account. Nestle represented on a number of occasions that it had the ability to retrieve the contents of Mr. McKenna's e-mail account only for a seven-day period prior to its search for such e-mails. It apparently provided Mr. McKenna with an affidavit from an individual named Larry Swift that employees' e-mail accounts are overwritten beginning on the eighth day after a message is either sent or received and that no additional e- mails beyond the ones produced by Nestle actually exist.

The issues raised by the motion for sanctions are issues which the Court cannot resolve unless further discovery is conducted. As Nestle notes, Mr. McKenna is free to depose either Mr. Swift or other Nestle individuals, or to ask additional questions to Nestle, concerning its alleged practice of overwriting e-mail accounts on the eighth day after e-mails are generated or received. If additional evidence comes to light indicating that Nestle had such information at the time Mr. McKenna made his request, or at the time that he filed his lawsuit, but intentionally deleted that information or negligently permitted it to be destroyed, an issue concerning spoliation of evidence might arise, and sanctions might be considered. Without any additional information, however, the Court is simply not in a position to make a factual determination as to whether Nestle or Mr. McKenna has the better of this argument.

The Court does note, as Mr. McKenna points out, that when he was discharged, seven specific e-mails were identified as containing communications that violated Nestle's electronic communications policies. Most of those e-mails were significantly more than seven days old. One was almost two years old. It is unclear how Nestle was able to retrieve these e-mails if its policy operated as described in its response to Mr. McKenna's motion. The Court suggests that Nestle investigate this matter and be prepared, if requested in discovery, to provide a further explanation of how the apparent discrepancy between its ability to retrieve e-mails in October 2004 and its current ability can be explained. Nevertheless, on the basis of the present record, Mr. McKenna's motion for sanctions will be denied without prejudice to its renewal should additional

evidence develop during the course of discovery which would contradict the representations Nestle has made concerning its ability to reconstruct e-mail accounts.

VII.

On June 12, 2006, Mr. McKenna filed a motion (#42) for an evidentiary ruling and to compel the disclosure of documents withheld under claim of privilege. The responsive and reply memoranda filed in connection with this motion indicate that Nestle did prepare and supply to Mr. McKenna a privilege log indicating that a number of documents were withheld on grounds of attorney-client or work product privilege. Mr. McKenna claims that many of the documents cannot be shielded by the privilege because Nestle waived any privilege relating to its investigation of his claims of sexual harassment because, in its answer, it raised the defense of adequate investigation as a way to avoid respondeat superior liability for actions taken by non-supervisory personnel. Mr. McKenna cites the First Circuit Court of Appeals' decision in United States v. Massachusetts Institute of Technology, 129 F3d. 681 (1st Cir. 1997) in support of his argument that pleading such a defense is a waiver of any otherwise-applicable privilege.

The citation of the Massachusetts Institute of Technology case is inapposite. That case deals with the waiver of privilege through the voluntary disclosure of privileged communications. Here, there is no evidence that Nestle has voluntarily disclosed the documents at issue to anyone. Thus, there has been no waiver of the privilege though disclosure. However, there is case law suggesting that by pleading the defense of adequate investigation (a

defense set forth in detail in two Supreme Court decisions, Burlington Industries v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)) an employer may waive privileges for documents related to that investigation. For example, in Walker v. County of Contra Costa, 227 F.R.D. 529 (N.D. Cal. 2005), the court found a waiver where the employer hired an attorney to investigate the plaintiff's claims of discrimination and then used the results of that investigation as a defense to a claim of vicarious liability. See also Brownell v. Roadway Package System, Inc., 185 F.R.D. 19 (N.D.N.Y. 1999). These cases make clear, however, that the waiver extends only to documents which constitute evidence of the investigation of the claim of harassment or discrimination. If an attorney had been consulted about an investigation but did not himself or herself conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself, the contents of the attorney's advice to the client about the investigative process and the decisions made by the employer remain privileged. See Waugh v. Pathmark Stores, 191 F.R.D. 427 (D.N.J. 2000). Nevertheless, as the Court in McGrath v. Nassau County Healthcare Corp., 204 F.R.D. 240, 245 (E.D.N.Y. 2001) noted, "it is inconsistent for [an employer] to invoke the Faragher-Ellerth defense but to retain the documents necessary to evaluate the sufficiency of its response as required by that defense."

Here, Nestle has asserted (albeit without an affidavit or other evidentiary document to support that assertion) that all the attorney-client privilege documents generated during the time frame during which Mr. McKenna was being investigated

constituted advice given by counsel located in Glendale, California to Nestle concerning the proper response to make to Ms. Goss's allegations. Assuming that to be true, and that those attorneys did not personally engage in the investigation, conduct interviews, or make decisions, their advice would be privileged. Further, the Court notes that the only pertinent investigation relating to the Faragher-Ellerth defense would be the investigation conducted concerning Mr. McKenna's claims of harassment by a co-worker, and not Nestle's investigation of the claims by Ms. Goss that Mr. McKenna engaged in some type of objectionable conduct. These documents do not appear to relate to that investigation and, in fact, it does not appear that many, if any, documents were generated concerning Mr. McKenna's complaint. Nestle has also represented that it has located and turned over to Mr. McKenna any documents which made up that investigation. For these reasons, it appears to the Court that Nestle's privilege log was properly compiled and that the documents which Mr. McKenna seeks are, in fact, covered by the attorney-client privilege. Again, however, Mr. McKenna is free to pursue in discovery the question of how, if at all, either the Glendale, California attorneys or other attorneys were involved in an investigation of his claims of harassment and to seek disclosure of any documents which might have been generated by attorneys who acted on Nestle's behalf in conducting such an investigation, as opposed to simply providing legal advice to Nestle during the course of that investigation. Thus, his motion to compel will be denied.

VIII.

On June 16, 2006, Mr. McKenna filed a motion requesting the Court to clarify what occurred at the April 6, 2006 discovery conference. Hopefully, the information provided in response to document #41 accomplishes that task. As stated, the Court's notes indicate that Nestle was to take certain actions within a week of the conference and the balance of the issues were to be subject to further discussion between Mr. McKenna and counsel. Mr. McKenna is free to raise, if necessary, any additional issues if he believes that Nestle has not fully complied with the Court's directives at the conference.

IX.

On July 31, 2006, Mr. McKenna filed a motion for leave to amend his complaint. In it, he asserts that he should be entitled to amend his complaint to assert a claim of sexual harassment dating back to 2002. Nestle has opposed this motion for a number of reasons, including that Mr. McKenna unduly delayed asserting the claim and that it is beyond the statute of limitations and was never properly presented to the EEOC. In response, Mr. McKenna has attached information which appears to indicate that this claim may have been part of the charge which he filed with the EEOC. The Court believes that, given the fact that most of Nestle's opposition to this claim relates to whether or not it may properly be brought, a better exercise of discretion would be to permit Mr. McKenna to amend his complaint to include the claim. If Nestle believes the claim is then subject to dismissal on jurisdictional or limitations grounds, it may file an appropriate motion and obtain a ruling from the District Judge assigned to the case. See, e.g., Morse/Diesel, Inc. v.

Fidelity and Deposit Co. of Maryland, 715 F.Supp. 578, 581 (S.D.N.Y. 1989).

X.

On August 7, 2006, Mr. McKenna filed a motion for protective order limiting the scope of discovery. In it, he complains that Nestle has demonstrated an intent to expand discovery beyond his complaints of harassment against Ms. Goss and his alleged improper use of his e-mail account by delving into personal matters such as whether he has engaged in extramarital affairs, fathered children out of wedlock, and other similar matters. Nestle responded to the motion by asserting that it had not insisted on responses to interrogatories covering those areas (although it did propound such interrogatories) and that Mr. McKenna's motion for a protective order was premature. However, Mr. McKenna's response indicates that, after Nestle made that statement, it then requested him to answer the questions or face a motion to compel. Consequently, the Court concludes that the issues raised by the motion are ripe for decision.

Nestle has not directly defended its position concerning these inquiries. Given the current state of the record, the Court does not believe that inquiries concerning Mr. McKenna's relationship history have anything to do with the single claim of discrimination propounded in this case relating to a very abbreviated time frame between when he first notified Nestle officials that he was being harassed by Ms. Goss and when his employment was terminated, a period of less than two months. Further, they do not relate to the proffered reason for Mr. McKenna's termination, nor would it appear that they are an effort to acquire evidence which, if it had

been known to Nestle at the time, would have supported the termination of Mr. McKenna's employment. It does not appear that Nestle would have refused to hire, or would have discharged, individuals who either engaged in extramarital affairs or who fathered children out of wedlock. Thus, the current state of the record supports Mr. McKenna's request for a protective order on these subjects. However, should additional claims be made or additional evidence be presented which might make these matters relevant, the Court will revisit the issue upon request.

XI.

Based upon the foregoing, the following motions are denied: #19, 23, 25, 28, 41, 42, and 43. #49 and #51 are granted. Mr. McKenna shall file his amended complaint within twenty days of the date of this order, and that filing deadline will not be affected by his more recent request for a stay. Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless

stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge